Testimony on 2007 AB 543

- **<u>What is the ordinary high-water mark (OHWM)? -</u>** The ordinary high-water mark (OHWM) is the point on the lakeshore where there is a distinctive mark that shows, by certain physical characteristics such as erosion marks or a change of vegetation, that the presence or action of surface water ends at that point.

- The area below the ordinary high-water mark is considered to be part of the lakebed and owned by the state. The ordinary high-water mark is also used in determining the rights of lakefront property owners and in determining what are "shorelands" for zoning ordinances enacted by counties.

- Currently, county zoning staff often will determine what the ordinary high-water mark is as people apply to county zoning departments for a variety of permits that relate to building or remodeling along shorelands, lake fronts or river front property.

- There are times when a county may ask the DNR to come in and assist in making the determination of what is the ordinary high-water mark. There are also times (such as a case involving DNR employee Scott Watson where the DNR came in and made their own determination of the OHWM without notifying local county zoning officials).

- A concern has been brought to my attention that the DNR may be attempting what has been termed a "land grab" through redefining property that has previously been determined to be wetlands and instead is now classifying the

property as lakebed. The situation that I am trying to address deals with what appears to be a change in direction from the DNR when it comes to making such determinations. Recently, the DNR has become much more aggressive in redefining property as lakebed and using the ordinary high-water mark to take away from private land owners property that previously was determined to be theirs, and upon which they have paid taxes.

- The policy implications of this simple change in definition are huge. In the first place, wetlands are privately held property while lakebeds (usually) are not. This has resulted in a situation where potentially as much as 120,000 acres of land in Oneida County which property owners previously believed was their privately owned land (and in some cases is land that has been in their family for more than 100 years, and is land that they have paid property taxes on during that time) is now considered public lakebeds. This reclassification has the potential to take as much as 120,000 acres of property off of the Oneida County tax-roll.

- **Statewide Issue –** although the DNR right now is using Oneida County and these types of decisions as a test case – it is clear that the policy that may develop from these decisions will have a statewide impact and eventually would apply to shorelines, river fronts and lake front property statewide.

- **Circuit Court and Attorney General's Opinion –** As noted above, the DNR and the Counties share the responsibility of determining the OHWM under current law. The Department of Justice, under then-AG Jim Doyle, recognized the important role that counties play in making OHWM determinations in the Donald Jones case (01-CV-375, Dane County). The court in that case agreed, saying that counties are "charged with making the final decision (of the OHWM

location) as it relates to the application of their zoning ordinances" under current law. Accordingly, this proposal does not seek to give OHWM determination authority to someone who isn't well-equipped to make such determinations. Instead, it simply designates a county OHWM decision as controlling over a DNR OHWM decision when those decisions differ.

- **Why Does The Law Need To Be Clarified –** I think the existing law is pretty clear when it comes to the authority of counties to make these determinations. Unfortunately, one of the things that has happened over time in my district is that the DNR has sued, or has threatened to sue counties that exercise the discretion that they are provided to make these determinations. The bill that I am proposing is clear. Often, I fully expect that the DNR and the local county zoning official making an ordinary high-water mark determination will come to the same conclusion. These determinations after all are scientifically driven and scientifically based. However, on the occasions where the DNR staff and the professional staff of the county zoning department do not agree it is the county's determination that will prevail.

- **There is Precedent For This Type of Proposal –** There are two parts of existing state statute that do what I am proposing here. In one case **30.103 Identification of ordinary high-water mark by town sanitary district.** The statutes say that a town sanitary district may identify the ordinary high-water mark of a lake that lies wholly within unincorporated territory and wholly within the town sanitary district. The department may not identify an ordinary high-water mark of the lake that is different than the ordinary high-water mark identified by a town sanitary district under this section.

In the second case, a 1997 budget amendment set the ordinary high-water mark on a specific lake (Big Silver Lake) in Waushara County.

- **People Want Consistency –** One of the most frustrating situations that people in my district (and in fact statewide) have faced is inconsistency on the part of the DNR. People want consistency and they want to be treated fairly. In another situation in my district a DNR employee classified an area as wetlands. The owner of the property built a home in compliance with all zoning requirements. Several years later when they decided that they wanted to build a garage, the DNR came in and subsequently defined the same property as lakebed. Suddenly, the person's home which previously was in compliance with existing zoning statutes was suddenly determined to be a non-conforming structure. We can not have a situation where these types of determinations are made at the political whims of state officials as the head of the DNR changes.

- There is nothing as a matter of law that says the county has to accept the DNR's decision currently. However, the DNR through the threat of potential lawsuits has often been able to prevent counties from exercising the local control that they already have over these types of decisions in many cases to its fullest.

- **This is why I drafted AB543-** to stop the DNR from stealing private land. If this property in question was wetland 100 years ago, 50 years ago, 5 years ago, 5 months ago-how all of a sudden can it be lake bed?

- **Ramifications-**

- Ownership
- Non-conforming structures – whole new class due to different setback requirements
- Taxation- takes property off the local tax rolls.

DNR misleading public on OHWM law, history

Dear Editor:

The Northern Lakes Chapter of the Wisconsin Society of Land Surveyors reviewed the article titled "Bill giving counties final OHWM say has its opponents" in the Wednesday, April 27, 2005, edition of your paper.

We specifically point out the paragraph that states "The DNR's position is that the state was given trust responsibility over public waterways at statehood, and that subsequent acts by land surveyors to include some of these waterways (or lakebeds) in private descriptions led to the current dilemma."

We feel this paragraph and statement by the Department of Natural Resources (DNR) is very misleading.

Over the last 150-plus years, there have been several court cases of land, water and navigability issues all affecting land title. These court cases have resulted in a wide variety of interpretation and confusion over property rights and land ownership, particularly as it relates to determination of the ordinary high-water mark (OHWM).

As a point of background, it should be noted that many of the land descriptions are derived from what is called a "federal patent." The patent is, in effect, a deed from the United States of America to the first landowner of the property, most of which date back to the mid- to late 1800s. The land surveyor is often called upon to determine the exterior boundaries of the description, which could be a forty, government lot or other description of land.

In northern Wisconsin, we are blessed with numerous water bodies and, as such, many of these water bodies fall within the exterior boundaries of a landowner's description that the federal government deeded to landowners.

When surveying, a surveyor tries to account for all of the property within one's land description. In the case of a water body, the surveyor will measure a line around the general outline of the water body, which is called a meander line and it is typically near the actual open water's edge.

This practice is included in instructions given by the U.S. federal government to surveyors who did the original government surveys for disposition of the public lands and dates back to the early 1800s. Surveyors continue this practice today.

However, surveyors fully recognize the actual water in the lakes and streams within these descriptions is public and held in trust by the state of Wisconsin.

The OHWM is a jurisdictional line that has been the subject of several court cases and governs many activities related to shoreland zoning. Several natural and man-made factors affect the OHWM line, such as dams, channels and beaver flowages, and the line can change over time. Over the years, how the OHWM line is determined by the DNR has been poorly understood and inconsistently determined by both DNR staff and other professionals.

An OHWM determination, on well-defined shoreline, where the nice, clean sand beach, free of any type of vegetation, meets the woods or lawn area and where the water leaves a distinct mark on the landscape is usually easy to make. In these cases, the rights in the land between this OHWM and the actual water's edge is clearly understood to be with the adjoining landowner, commonly

referred to as a riparian owner.

However, when a water body adjoins a wetland, the determination of the OHWM is complex and controversial. The rights and ownership between the OHWM and the actual water's edge or description line are causing the most uncertainty for landowners.

In addition, this OHWM has significant impact on landowners who wish to build or improve their lands by these wetlands that adjoin water bodies.

Two examples of these inconsistencies are in Oneida County. The first can be seen on Highway 17, just south of the unimproved wayside by Jennie Webber Lake. A large billboard was erected on the west side of the highway near a wetland. An initial determination by the DNR indicated the sign was approximately 20 feet from the OHWM of Jennie Webber Lake. The actual open water's edge of Jennie Webber Lake is more than 1,000 feet east of this sign and is separated by the highway and a timbered wetland. The initial determination is being re-evaluated.

The second example is of a landowner who obtained a building permit for a house after having an OHWM determination made by a DNR staff member indicating the house location exceeded the 75-foot setback. Several years later, the then current landowner wanted to build a garage and again asked for an OHWM determination.

The DNR staff person made an OHWM that now made the house within the 75-foot setback and was unable to obtain a building permit for the garage since its proposed location also was within the new 75-foot setback area. It was claimed a portion of the ice ridge eroded □away that warranted the marking of the new OHWM location.

It is regrettable that the DNR believes this dilemma is a result of actions by land surveyors and does not recognize the impact of their own practices, policies and other factors, which significantly contribute to this quandary.

The surveyors are looking forward to working with our legislators, local government officials, the DNR and others in bringing a resolution to this issue. We encourage all water property owners, lake associations and others to follow this issue closely as it will have a significant impact on their property rights.

If an organization wishes to have a presentation on these issues, please contact Jimmy Rwein at (715) 356-5100 or Michael Romportl at (715) 362-4850 to arrange for a presentation.

Sincerely,

James (Jimmy) L. Rein

President

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TESTIMONY OF TODD AMBS, WATER DIVISION ADMINISTRATOR ON AB 543 BEFORE THE ASSEMBLY NATURAL RESOURCES COMMITTEE DECEMBER 19, 2007

Good morning Chairman Gunderson and members of the Committee. The Department of Natural Resources appreciates the opportunity to provide information about the ordinary high water mark (OHWM), state our understanding of the issue at hand, and share our actions and recommendations to improve the situation.

The issue is that people may not be aware of the location of the OHWM in settings such as bog-fringe lakes or the Great Lakes. One key solution to this issue is to have a mechanism for people to get information about the OHWM when they buy or build. Another is to clarify survey practices. Finally, training and mapping are helpful tools that we are delivering. While we value local government as partners in natural resources conservation, we oppose AB 543 because it does not resolve the problem and may exacerbate it.

Let me provide some background about the ordinary high water mark. The ordinary high water mark has been defined in Wisconsin law for nearly 100 years as the point on the bank or shore where the presence or action of surface water is so continuous as to leave a distinct mark. Waves and currents mark a variety of places with erosion, destruction of vegetation, water stains and other features – but the OHWM is the most permanent and predominant feature (e.g., root adaptation of long lived tree species, soils indicative of persistent wet conditions). In most places, these indicators are readily seen. In some places, professional training and thorough observation are needed. Our fact sheet and web site printout are attached.

The correct location of the OHWM is critical to eagles, loons, songbirds, game fish and the wide array of species that are enjoyed by waterfront property owners and visitors alike. Fish and wildlife rely for their survival on a relatively undisturbed corridor of natural vegetation and diverse underwater substrates, including aquatic plants and downed trees. Extensive research shows that we've protected minimal buffers – so it's essential to measure from the right place.

The correct location of the OHWM is also critical not only to an orderly system of land records, but also to property owners' relationships with their neighbors and peace of mind about their most valuable possession – their land. As more people seek to live along and use our lakes and rivers, it's essential to measure from the right place.

People from Wauwatosa own lake property near Hayward. Visitors from Minnesota fish and boat on lakes all across Wisconsin. Just as lakes and streams are not strictly used by those who live nearby, public waters are not under local authority. Local governments are key partners, but cannot be the sole authority because they are local. The rights to boat, fish, hunt, swim and enjoy natural scenic beauty extend to the entire public, not just to the local residents to whom local governments are responsible.

DNR recognizes the need to make OHWM data widely available and ensure that people get the right information in a timely way. We are working with surveyors and agency colleagues in plat review and assessment to make OHWM information readily available, generally understood and consistently shown on plats of survey.

We value local government as partners in natural resources conservation of public waters. For decades and in the vast majority of situations, state and local government staff have readily resolved any discrepancies in finding the OHWM by comparing notes on their observations of plants, soils and other OHWM indicators. Where this does not occur, the courts are assigned as ultimate arbiters so that if necessary the State Supreme Court can interpret the Constitution. As a matter of our State Constitutional obligation, no branch of state government may assign sole control of determinations about public waters to an entity other than the state.

In summary, the Department of Natural Resources urges solutions other than AB 543. We have, and will continue to, work with legislators, other agencies, local governments, professional groups and any other entities to resolve this issue – and meet the challenge of balancing all the competing uses of Wisconsin's lakes and streams.

For the Department of Natural Resources:
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